NO. 44366-0-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

BRIAN EVAN HUMES, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frank Cuthbertson

No. 12-1-00809-6

BRIEF OF RESPONDENT

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A. ISSUE PERTAINING TO APPELLANT'S ASSIGNMENT OF ERROR.

1. Appellant was not entitled to the defense of "uncontrollable circumstances," therefore he was not denied effective assistance of counsel.

B. STATEMENT OF THE CASE.

1. Procedure

Appellant was charged on March 8, 2012, for criminal acts occurring on March 6, 2012, which included felony harassment, assault in the fourth degree, and malicious mischief. CP 1-3. Appellant was arraigned and conditions of release set by the court. CP 146-47.

On April 12, 2012, the appellant signed for several court dates to include an omnibus hearing on May 8, 2012. CP 145. The defendant failed to appear for this court hearing.

On December 17, 2012, the State filed an amended information that eliminated the count of malicious mischief and added one count of bail jumping for his failure to appear for the May 8, 2012, omnibus hearing.

The case proceeded to trial and the defendant was acquitted of all but the bail jumping charge. CP 103-115.

This appeal timely follows.

2. Facts

Appellant was charged with assaulting and threatening his ex-girl friend. He was also initially charged with damaging the vehicle belonging to a friend of his ex-girl friend, but that charge was eliminated prior to trial. CP 148. At his March arraignment, the appellant signed the court-issued *Order Establishing Conditions of Release.* CP 146-47. Page two of the *Conditions of Release* include a clear advisement that the defendant is obligated to appear for each court appearance. Further, the defendant is advised that his or her failure to appear at any appearance associated with the case is an independent felony offense. CP 147. Appellant signed the conditions of release and subsequent court documents setting various dates in his case. CP 146-47, 145.

On April 12, 2012, appellant signed an *Order Continuing Trial* for a new trial date of June 12, 2012, with an omnibus date of May 8, 2012. All necessary parties signed. CP 145. The *Order* included not only the new dates, but also the time of 8:45 a.m. for the omnibus hearing, and 8:30 a.m. for the trial. CP 145. The same *Order* included the courtroom in which his case was assigned, courtroom 260. It also contained the following language in bold above the newly set dates:

> *"IT HIS HEREBY ORDERED THE DEFENDANT SHALL BE PRESENT AND REPORT TO:"*

CP 145.

The case proceeded to trial where the defendant testified. Appellant testified that on May 8, 2012, he sent a text message to his attorney, who was also his trial attorney. He sent the text message just over 15 minutes after he was supposed to have appeared for his court appearance. (His court appearance was for 8:45 a.m.; he testified he texted his attorney at 9:01.) 2 RP 73. Appellant claimed to be on his way to the courthouse at that time. He testified his attorney told him a warrant had already issued and he would need to set a quash hearing. He claims he did not come to court on advice of counsel. 2 RP 73-74.

C. ARGUMENT.

1. APPELLANT WAS NOT ENTITLED TO THE DEFENSE OF "UNCONTROLLABLE CIRCUMSTANCES."

a. Appellant failed to make a showing of uncontrollable circumstances as required by the statute and therefore was not denied effective assistance of counsel for counsel's failure to request the instruction.

A defendant is entitled to have the jury instructed on his theory of the case if sufficient evidence supports that theory. ***State v. Harvill,*** 169 Wn.2d 254, 259, 234 P.3d 1166 (2010). When a court reviews a trial court's refusal to give a requested jury instruction on a ruling based on law, the standard of review is de novo. ***State v. Walker,*** 136 Wn.2d 767, 772, 966 P.2d 883 (1998). When the court's refusal to give a jury instruction is based on factual reasons, the review is for an abuse of

discretion. ***Walker***, 136 Wn.2d at 771-772. In this matter, there was no request for the instruction; therefore, appellant argues he was deprived of effective counsel. To begin the evaluation, we first turn to the applicable standard regarding appellant's obligation on the issue of ineffective assistance of counsel.

Both the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right to effective representation. ***State v. Hendrickson***, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). A defendant demonstrates ineffective representation by satisfying the two-part standard initially announced in ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and subsequently adopted in Washington. ***State v. Jeffries***, 105 Wn.2d 398, 418, 717 P.2d 722, *cert. denied*, 479 U.S. 922, 107 S. Ct. 328, 93 L. Ed. 2d 301 (1986). To demonstrate ineffective assistance of counsel, the defendant must show (1) counsel's performance was objectively unreasonable; and (2) the deficient performance prejudiced the defense. ***Jeffries***, 105 Wn.2d at 418, 717 P.2d 722 (citing ***Strickland***, 466 U.S. at 687, 104 S. Ct. 2052). The defendant bears the burden of proving both parts, and failure to establish either part defeats the ineffective assistance of counsel claim. ***Jeffries***, 105 Wn.2d at 418, 717 P.2d 722 (citing ***Strickland***, 466 U.S. at 687, 104 S.Ct. 2052).

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that

counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable. ***Strickland v. Washington***, 466 U.S. 668, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984).

Competency of counsel is determined based upon the entire record below. ***State v. White***, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing ***State v. Gilmore***, 76 Wn.2d 293, 456 P.2d 344 (1969)). Courts engage in a strong presumption counsel's representation was effective. ***State v. Brett***, 126 Wn.2d 136, 198, 892 P.2d 29 (1995); ***State v. Thomas,*** 109 Wn.2d 222, 226, 743 P.2d 816

Appellant must show that he would have prevailed in the trial court had his counsel requested the jury instruction regarding "uncontrollable circumstances." He cannot meet his burden.

RCW 9A.76.170(2) is an affirmative defense to a defendant's failure to appear. It serves as an excuse for failing to appear, it does not negate the knowledge element. ***State v. Fredrick***, 123 Wn. App. 347, 353, 97 P.3d 47 (2004). The defendant must persuade the fact finder by a

preponderance of the evidence that he has established this affirmative defense. ***State v. Riker***, 123 Wn.2d 351, 368, 869 P.2d 43 (1994).

> RCW 9A.76.170(2) defines uncontrollable circumstances as:
>
> an act of nature such as a flood, earthquake, or fire, or a medical condition that requires immediate hospitalization or treatment, or an act of a human being such as an automobile accident or threats of death, forcible sexual attack, or substantial bodily injury in the immediate future for which there is no time for a complaint to the authorities and no time or opportunity to resort to the courts.

As these examples show, "uncontrollable circumstances" are sudden, unexpected, debilitating, and generally render a person physically incapable of appearing in court. In contrast, scheduling conflicts and confusion over multiple court dates are foreseeable, preventable, and fall squarely within the defendant's control. These issues do not constitute "uncontrollable circumstances" within the meaning of RCW 9A.76.010(4).

Additionally, Humes must show that he "did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear." RCW 9A.76.170(2). Defendant acknowledges that he was not at court *prior* to any contact with his attorney. 2 RP 73. He had already failed to appear at the appointed time. The documents he received setting the various dates do not provide for another person, attorney or otherwise, to "call him off" from appearing. By his failure to appear in a timely manner, he created the circumstances that he now claims prevented him

from appearing for his scheduled court hearings. Accordingly, Humes failed to present sufficient evidence to support an uncontrollable circumstances defense.

If the defendant was not entitled to the instruction, he cannot then use that as a basis for his claim of ineffective assistance of counsel. He must demonstrate that he would have prevailed in his request *and* that it would have resulted in a different outcome. He cannot meet this burden. His claim of ineffective assistance of counsel must fail.

In support of his position, he cites to a federal deportation case, ***Monjaraz-Munoz v. I.N.S.,*** 327 F.3d 892 (9th Cir. 2003). The case is significantly distinguishable. Factually the cases are separate and distinct. The defendant in ***Monjaraz-Munoz*** submitted declarations that he received instruction from his counsel to leave the country *prior* to his hearing. When he lost his hearing as a result of being absent, he filed a bar complaint, among other documents. Though his attorney denied giving the advice, the hearings examiner found there was sufficient evidence to make a finding for the basis for which Monjaraz-Munoz was not present at the hearing.

In the present case, even under the defendant's version of events, he was already overdue for his court appearance when he initiated contact with his attorney. He was even more overdue by the time he and his counsel spoke. 2 RP 73. Since trial counsel was also counsel at the time of the failure to appear, we don't have his testimony as part of the record.

However, even under defendant's explanation of events, it is uncontroverted that anything told defendant was based upon the belief that his tardiness made him too late to appear. *Id.* There is no assertion that the defendant received any advice of his May 8th court day, i.e. the case was not going to be heard, the date was changed, etc. that would excuse defendant's failure to be at court at 8:45 a.m. in room 260, just as he was instructed.

The procedural differences between the immigration case and the present case also make the cases distinguishable. The subsequent trial court was mandated to accept the findings which needed to be, "[m]ore than a mere scintilla" to support the conclusions of the deportation hearing. The court was specific to note that, "[u]nder this "extremely deferential" standard, we must uphold the BIA's findings unless the evidence presented would compel a reasonable finder of fact to reach a contrary result." ***Monjaraz-Munoz*** at 895. The Court continued, they must determine if an alien's failure to appear at a hearing was due to circumstances "beyond the control of the alien." They elected to conclude that ***Monjaraz-Munoz*** relied on the erroneous advice of his counsel and that it constituted such a circumstance. ***Monjaraz-Munoz*** at 896. The court also noted the uniqueness of the deportation process and aliens as participants.

> The role of an attorney in the deportation process is especially important. For the alien unfamiliar with the laws of our country, an attorney serves a special role in helping

> the alien through a complex and completely foreign process. Therefore it is reasonable for an alien to trust and rely upon an attorney's advice to such an extent that if an alien fails to show up to a hearing because of an attorney, we can say that this is an exceptional circumstance beyond the control of the alien.

Monjaraz-Munoz at 897. Unlike Mr. Monjaraz-Munoz, defendant had already failed to appear on his own accord *prior* to speaking with his counsel. This is a situation he created. Humes contributed to the creation of the circumstances in reckless disregard of the requirement to appear. RCW 9A.76.170(2).

The defense requires both uncontrollable circumstances and that the defendant not have contributed to the creation of such circumstances. In the present case, defendant cannot meet either requirement.

First, as previously discussed, defendant was already in a non-appearance status when he spoke with counsel. Any advice allegedly given by counsel was based upon circumstances of the defendant having already failed to appear for court.

Second, even if one were to consider counsel's advice as an uncontrollable circumstance, the defense still fails because it is evident that the defendant created the circumstance by failing to appear at the given time. There is no dispute that he received documentation that provided him anything other than the date, time, and place for him to

appear on May 8, 2012. CP 145. He had not even left his residence by the time he heard back from his counsel some time later. The defendant clearly contributed to the circumstance by failing to appear at court at the stated date and time. He is not entitled to the defense of uncontrollable circumstances.

D. CONCLUSION.

The defendant has failed to satisfy the two prongs necessary to establish that he received ineffective assistance of counsel.

He failed to appear in court at the time stated on his documentation that he acknowledges having received. Furthermore, he contributed to the circumstances by not appearing at the appropriate time that lead to counsel allegedly telling him he was already too late to appear to avoid a warrant. The conversation would have been wholly unnecessary had defendant appeared as directed. Therefore, defendant's conviction for bail jumping should be affirmed.

DATED: December 20, 2013

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Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail or~~ ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

1-3-14 _____
Date Signature

APPENDIX "A"

C

Effective:[See Text Amendments]

West's Revised Code of Washington Annotated Currentness
Title 9A. Washington Criminal Code (Refs & Annos)
Chapter 9A.76. Obstructing Governmental Operation (Refs & Annos)
9A. 76. 170. Bail jumping

(1) Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state, or of the requirement to report to a correctional facility for service of sentence, and who fails to appear or who fails to surrender for service of sentence as required is guilty of bail jumping.

(2) It is an affirmative defense to a prosecution under this section that uncontrollable circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or surrender, and that the person appeared or surrendered as soon as such circumstances ceased to exist.

(3) Bail jumping is:

(a) A class A felony if the person was held for, charged with, or convicted of murder in the first degree;

(b) A class B felony if the person was held for, charged with, or convicted of a class A felony other than murder in the first degree;

(c) A class C felony if the person was held for, charged with, or convicted of a class B or class C felony;

(d) A misdemeanor if the person was held for, charged with, or convicted of a gross misdemeanor or misdemeanor.

CREDIT(S)

[2001 c 264 § 3; 1983 1st ex.s. c 4 § 3; 1975 1st ex.s. c 260 § **9A. 76. 170.**]

Current with all 2013 Legislation

END OF DOCUMENT

Reports and Related Materials

2001 c 264 § 3

Reports

Washington Bill History, 2001 Regular Session, House Bill 1227, WA B. Hist., 2001 Reg. Sess. H.B. 1227, December 18, 2001

Washington Final Bill Report, 2001 Regular Session, House Bill 1227, WA F. B. Rep., 2001 Reg. Sess. H.B. 1227, July 20, 2001

Washington House Bill Report, 2001 Regular Session, House Bill 1227, WA H.R. B. Rep., 2001 Reg. Sess. H.B. 1227, April 20, 2001

Washington Senate Bill Amendment, 2001 Regular Session, House Bill 1227, WA S. Amend., 2001 Reg. Sess. H.B. 1227, April 18, 2001

Washington Senate Bill Report, 2001 Regular Session, House Bill 1227, WA S. B. Rep., 2001 Reg. Sess. H.B. 1227, March 27, 2001

Washington Senate Bill Amendment, 2001 Regular Session, House Bill 1227, WA S. Amend., 2001 Reg. Sess. H.B. 1227, March 27, 2001

Vote Records

Washington Vote Roll Call, 2001 Regular Session, House Bill 1227, WA Votes, 2001 Reg. Sess. H.B. 1227, June 14, 2002

➞9A.76.170. Bail jumping

CREDIT(S)

[2001 c 264 § 3; 1983 1st ex.s. c 4 § 3; 1975 1st ex.s. c 260 § 9A.76.170.]

HISTORICAL AND STATUTORY NOTES

Effective date--2001 c 264: See note following RCW 9A.76.110.

Severability--1983 1st ex.s. c 4: See note following RCW 9A 48.070.

Laws 2001, ch. 264, § 3, rewrote the section, which previously read:

"(1) Any person having been released by court order or admitted to bail with the requirement of a subsequent personal appearance before any court of this state, and who knowingly fails to appear as required is guilty of bail jumping.

"(2) Bail jumping is:

"(a) A class A felony if the person was held for, charged with, or convicted of murder in the first degree;

"(b) A class B felony if the person was held for, charged with, or convicted of a class A felony other than murder in the first degree;

"(c) A class C felony if the person was held for, charged with, or convicted of a class B or class C felony;

"(d) A misdemeanor if the person was held for, charged with, or convicted of a gross misdemeanor or misdemeanor."

PIERCE COUNTY PROSECUTOR

January 03, 2014 - 12:43 PM

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